Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ROBERT T. TYRREL, M.D.,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in affirming the district court's opinion by failing to apply a de novo standard of review to Petitioner's appeal.

2. Whether the Court of Appeals for the Fifth Circuit erred in failing to properly apply the appropriate statute of limitations, which would have barred Respondent's cause of action as a matter of law.

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OPINION BELOW

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STATEMENT OF JURISDICTION

This suit was brought in the United States District Court for the Southern District of Texas-Houston Division, pursuant to 28 U.S.C. §1345 (1994) and 42 U.S.C. §254(l) (1994). That court entered a final order granting summary judgment on all issues in favor of the United States on January 22, 1996. The district court's judgment was appealed to the Court of Appeals for the Fifth Circuit according to 28 U.S.C. §1291 (1994). The district court's opinion was affirmed by order dated November 13, 1996. Rehearing *en banc* was sought but denied on January 13, 1997. The instant petition for certiorari was originally filed within ninety (90) days of that date. The petition was returned to the Petitioner for correction and return to the Court by June 17, 1997. Petitioner now seeks review by this Court pursuant to 28 U.S.C. §1254 (1994) and Rule 13 of the Rules of the United States Supreme Court.

Because the United States is a party to this suit, service of this petition for certiorari is made upon the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington, D.C. Mr. William Kanter, attorney for Respondent is additionally served with the petition for certiorari at U.S. Department of Justice, Civil Division, Appellate Staff, Room 7400 MAIN, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved in this case are 28 U.S.C. §2415(a) (1994), 42 C.F.R.§62.72 (1989), 42 C.F.R.§62.73 (1989), 42 C.F.R.§62.74 (1989), 42 C.F.R.§62.73 (1995), and the Public Health Service Amendments of 1987, Pub. L. No. 100-177, §204(a)(4), 101 Stat. 986 (1987) and are reproduced in the Appendix at pages 18a - 29a, Appendices D, E, F, and G respectively. The rule involved in this case is Federal Rule of Civil Procedure 56(c).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

Respondent, the United States of America (the "U.S."), filed this lawsuit in the United States District Court for the Southern District of Texas, Houston Division, against Petitioner, Dr. Robert T. Tyrrel ("Tyrrel"), alleging failure to repay medical school education loans granted to him under the National Health Services Corps Scholarship Program. Respondent sought repayment of the principal plus treble damages and unpaid interest. Petitioner answered, specifically denying the allegations and setting forth his affirmative defenses. On June 5, 1995, Respondent filed its Motion for Summary Judgment. On July 5, 1995, the parties were granted a Joint Stipulation and Motion to Vacate the Court's Scheduling Order and to Order this Matter to Mediation, which had the effect of staying

Respondent's Motion for Summary Judgment. The parties were unable to settle. Petitioner filed a Cross Motion for/Response to Summary Judgment. On December 12, 1995, Respondent replied to Petitioner's Cross Motion for Summary Judgment. On January 19, 1996, after consideration of both Motions, the district court granted summary judgment for Respondent and entered its Memorandum of Law. The court awarded Respondent $149,588.14, plus a 10% surcharge on the judgment authorized under 28 U.S.C. §3011, plus interest at the rate of 5.16% per annum from date of judgment until paid.

On November 7, 1996, the Fifth Circuit Court of Appeals heard oral arguments in this case. The court issued its opinion on November 13, 1996. The opinion, attached as Appendix B, stated "[f]inding no error or [sic] law or fact in the district court's judgment, this court affirms on the basis of the district court's order entered January 22, 1996."

On December 26, 1996, Petitioner filed in the Fifth Circuit Court of Appeals its Brief in Support of Suggestion for Rehearing *En Banc*, based on the belief that the court's opinion reflected a failure by that court to apply the proper standard of review. On January 13, 1997, the Fifth Circuit issued its decision to decline to reconsider its opinion. (App. 16a).

It is this opinion, and its clear conflict with the decisions of other circuits, namely the Federal Circuit, which Petitioner asks this Court to review.

The Petition is originally filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment

on writ of certiorari rests upon Section 1254(1) of the Judicial Code (11 U.S.C. §1254(1) (1994)).

B. Statement of Facts

Dr. Robert T. Tyrrel commenced medical school in 1979 at the University of Texas Health Science Center at Houston, Texas. To aid him in supplementing the cost of tuition, he sought and received financial assistance through the National Health Service Corps Scholarship Program ("NHSC") for the first two years (1979-1980) for a total of $14,865.00.

In exchange for the financial aid, Dr. Tyrrel agreed to provide one year of service for each year of financial assistance received. He was to fulfill his obligation by serving in a Health Manpower Shortage Area ("HMSA"). These were areas designated by the NHSC as having a shortage of physicians. Upon graduation of medical school in 1983, Dr. Tyrrel applied for and received a deferment of his service obligation to pursue a residency in obstetrics/gynecology ("OB/GYN").[1]

During his first year in the OB/GYN residency program, Dr. Tyrrel began to explore a change to a radiology residency for the 1984-1985 academic year; however, he completed his first year in the OB/GYN program.

In 1984, near the completion of his first year as an OB/GYN

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1. Such deferments were routinely given to participants who desired to complete residencies in specialty areas which the NHSC desired and approved.

resident, he received a form from the NHSC entitled "Deferment Request for 7/1/84 - 6/30/85." After reviewing the form, Dr. Tyrrel indicated on the form that he was interested in changing his residency from OB/GYN to radiology. Dr. Tyrrel considered the notation on the deferment form as notification of his intended change in residency which, if denied, would force him to either complete the OB/GYN residency or fulfill his NHSC obligation prior to further graduate study. The NHSC, however, interpreted it as an assertion by Dr. Tyrrel that he had left his position as an OB/GYN resident before completing his first year and that he was beginning a new residency program in radiology and would not complete the OB/GYN program. The NHSC failed to respond until over two months later. Instead of refusing Dr. Tyrrel's request, the NHSC notified him that he was in default. This had the effect of trebling the principal borrowed and charging interest as provided for by statute. Dr. Tyrrel was surprised and upset by this notice.

After being declared in default, Dr. Tyrrel remained in contact with the NHSC. He continued, on his own, to make payments on the amount demanded. The NHSC requested that Dr. Tyrrel enter into a written agreement establishing a payment plan. Although the NHSC was in agreement with the reduction in the interest rate, the terms of the agreement were otherwise unacceptable.

Dr. Tyrrel made further attempts to satisfy his obligation under the scholarship agreement. After learning that the NHSC did not need radiologists, his fiancee offered to fulfill his obligation by providing services as a pediatrician. Dr. Tyrrel's fiancee's service would have satisfied the intent of the program

(to alleviate the geographic maldistribution of health professionals), however, the agency refused to consider this proposal.

Dr. Tyrrel also attempted to fulfill his obligation through the Special Repayment Program ("SRP").[2] (App. 30a). This program provides a time-limited opportunity for persons, who were, on November 1, 1987, in breach of an NHSC Scholarship Program contract, to satisfy their scholarship obligations through full time clinical service. On June 2, 1988, the NHSC was notified by Dr. Tyrrel that he was interested in participating in Option II of the agreement. The effect of Tyrrel executing the SRP contract was to toll the statute of limitations. Under Option II, a participant must "match" to a specific site by a certain date to be eligible to participate. In addition, Dr. Tyrrel was to serve either 150% of his remaining service obligation or serve 100% of his remaining time and pay an amount equal to the scholarship support he received. Unfortunately, this plan failed regarding Dr. Tyrrel. He anticipated being placed in a radiology position but few were available, none of which matched his skills and qualifications, and as a result, he did not "match" by the February 15, 1989 statutory deadline. On April 13, 1989, after the deadline for a "match" had passed, the NHSC sent Dr. Tyrrel a letter indicating that the statute enacting the SRP had been amended on April 3, 1989. The newly amended statute extended the Option II deadline to May

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2. The SRP was enacted by Congress (Section 204 of Public Law 100-177) to address the growing number of physicians who had been declared in default of their NHSC scholarship obligation.

15, 1989. Dr. Tyrrel failed to meet this deadline also. On June 23, 1989, the NHSC sent notice to Dr. Tyrrel that he had failed to meet the deadline under the SRP agreement. (App. 53a).

In November 1990, Dr. Tyrrel requested an administrative hearing regarding his default status. By letter of March 28, 1991, the Division of Fiscal Services notified him that following a review of Tyrrel's record, it was determined that Dr. Tyrrel was correctly placed in default.

Then, on September 27, 1994, a lawsuit was filed by the United States against Dr. Tyrrel. Cross-motions for Summary Judgment were filed on June 5, 1995. The District Court granted Appellee's Motion on January 22, 1996. Notice of Appeal was filed on February 16, 1996, and this Court rendered its decision on November 13, 1996. Tyrrel's Suggestion for Rehearing *En Banc* was denied on January 13, 1997.

SUMMARY OF THE ARGUMENT

Petitioner, Dr. Robert T. Tyrrel, asserts that the United States District Court never properly analyzed the statute of limitations issue when it refused to take into account the evidence presented by Petitioner relating to the SRP agreement, the statutes, and their controlling regulations. Instead, in ruling on the United States' motion for summary judgment, it viewed all evidence in favor of the United States, directly contradicting well-established case law mandating the District Court consider all evidence and any justifiable inferences in favor of the nonmovant. The Fifth Circuit Court of Appeals failed to apply a *de novo* review, which requires a similar analysis, looking at

all evidence in favor of the nonmoving party but acting as if it were the initial trier of fact. *De novo* review demands a minimum level of analysis. The Court of Appeal's "rubber stamping" of the District Court's erroneous decision evidences no analysis, thus failing to apply the proper standard of review set forth by law. Had the Court of Appeals correctly reviewed the evidence *de novo*, it would have reached the inevitable conclusion that this suit is time-barred by the statute of limitations or at a minimum that a genuine issue of material fact exists as to the proof of that affirmative defense. Instead, the District Court's decision and its affirmance by the Fifth Circuit result in not only an erroneous application of the law but also a split in authority between the federal circuits.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S OPINION GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BY FAILING TO APPLY A *DE NOVO* STANDARD OF REVIEW.

A court of appeals, in reviewing a district court's granting of summary judgment, should use a *de novo* standard. *Carnival Leisure Industries, Ltd. v. Aubin*, 938 F.2d 624, 626 (5th Cir. 1993). *De novo* means anew, afresh, or a second time. BLACK'S LAW DICTIONARY 226 (5th ed. 1983). Under Federal Rule of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." FED. R .CIV. P. 56(c). *See also Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). In making its determination, the court draws all justifiable inferences in favor of the nonmoving party. *Id.* at 255. In establishing the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. *See id.* It is sufficient that the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Id.* Further, the evidence of the opposing party is to be believed, and all reasonable inferences are to be drawn in favor of the nonmovant. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The District Court erred by failing to analyze whether the Secretary had statutory authority to determine when Tyrrel was no longer a participant under the SRP, and, in turn, when the statute of limitations recommenced. The tolling of the statute is dispositive of whether or not this case is time-barred. The District Court merely accepted Respondent's evidence as true, when the evidence presented by Petitioner clearly creates a fact issue. The lower court's order further evidences the lack of analysis of evidence relating to the statute of limitations issue. (App. 8a - 9a).

The opinion issued by the Fifth Circuit Court of Appeals provides no basis for its reasoning or that of the District Court. A court of appeals **must** review anew all available evidence, construing it in favor of Petitioner, to determine whether an issue of material fact exists. *Milwaukee Area Joint Apprenticeship Training v. Howell*, 67 F.3d 1333, 1336 (7th Cir. 1995). *Celotex* and *Anderson*, entitle Tyrrel to a minimum level of analysis regarding evidence presented. *See Celotex*, 477 U.S. at 322. *See also Anderson*, 477 U.S. at 242. "Finding no error or [sic] law or fact in the district court's judgment, this court affirms on the basis of the district court's order entered January 22, 1996" is not a correct application of the *de novo* review process. The Court of Appeals never considered or opined about the tolling issue, or addressed it at oral argument. Instead, it completely disregarded Petitioner's argument and without explanation, adopted the district court's decision, which totally disregarded the provisions of the SRP contract and the federal regulations and provided no explanation or analysis of the statute of limitations issue. Failure to follow established summary judgment standards of review is a matter of exceptional importance, as the judiciary may not act in complete disregard of legislative enactments and case law. Moreover, the District Court's decision and its affirmance by the Court of Appeals fails to recognize the applicability of 28 U.S.C. §2415(a) and directly contravenes case law of the Federal Circuit Court of Appeals.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S OPINION GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BY FAILING TO PROPERLY APPLY

THE STATUTE OF LIMITATIONS, WHICH BARRED RESPONDENT'S CAUSE OF ACTION AS A MATTER OF LAW.

A. The language of the agreement and applicable statutes and regulations was clear and unambiguous as to when the statute of limitations was tolled.

An action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract must be filed within six years after the right of action accrues. 28 U.S.C. § 2415(a) (1994). (App.27a). By signing the SRP contract, the statute of limitations was tolled until Tyrrel ceased to be an SRP participant. The United States claims the statute of limitations was tolled until June 23, 1989, when it sent the letter confirming that Tyrrel was no longer a participant in the SRP; however, this cause of action was only tolled until February 15, 1989, when Tyrrel failed to match to a site, an express requisite of the SRP contract. The cause of action accrued on August 10, 1985. Tyrrel's last partial payment on the loan, made September 28, 1987, caused the cause of action to accrue again. 28 U.S.C. § 2415(a) (1994). (App. 27a). *See also* Timeline (App. 52a). Under the SRP, the limitations period is tolled during participation in the program. Section 204(a)(4) of Public Law No. 100-177 states that the statute of limitations is tolled from the date the Secretary receives notice of an individual's intent to participate in the SRP "until such time as it is determined by the Secretary that such individual will not be relieved of liability under the Public Health Service Act as provided under this section." Public Health Service Amendments of 1987, Pub. L. No. 100-177,

Sec. 204(a)(4), 101 Stat. 986 (1987). (App. 29a).

Tyrrel's participation in the SRP began on June 2, 1988, when the agency received his notice to participate. This tolled the statute of limitations. The SRP required Tyrrel to "match" to a site by February 15, 1989. "Match" means the Secretary has received documentation of (1) an offer of employment from a site which specifies at least the agreed upon salary and start date, and (2) the Program participant's acceptance of that offer. 42 C.F.R. §62.72 (1989). (App. 18a).

> If a program participant does not match to a site or begin service at that site within the time frames described in paragraph (d) of this section, his or her participation in the SRP will be automatically ended and he or she will remain liable for the full scholarship debt, including accrued interest and/or damages.

42 C.F.R. §62.73(f) (1989) (emphasis added) (App. 21a).

The agency indisputably did not receive notice from a site of an offer of employment for Tyrrel nor did Tyrrel accept an offer of employment under the program. Tyrrel's participation, upon failing to match to a site by the deadline, was "automatically ended." Pursuant to statute, the Secretary's determination was made by statute when Tyrrel had not "matched" by the February 15, 1989 deadline. 42 C.F.R. §62.73(f) (1989). (App. 21a). A letter from the agency dated October 27, 1988, reminded Tyrrel "if you fail to meet these deadlines, you will no longer be eligible for service under the Special Repayment Program." It would undermine the purpose

of the regulatory statute to interpret this provision as giving the Secretary power to arbitrarily determine when a participant will not, in *its* mind, be relieved of liability, when the statute has already automatically ended the entrant's participation. To allow the Secretary to determine that a person is no longer a participant after the statutory deadline has passed would render the regulatory deadlines useless. The agency, having failed to receive any offers of employment for Tyrrel by February 15, 1989, was statutorily relegated to consider Tyrrel's participation automatically terminated. This would cause the statute of limitations to recommence on February 16, 1989. *See* Timeline (App. 52a).

The United States further claims that an April 3, 1989 amendment to the Code of Federal Regulations applied to Tyrrel's SRP agreement, having the effect of extending the deadline to match to a site until May 15, 1989. The contract provides Tyrrel agrees to:

> [c]omply with the provisions of Title 42, Code of Federal Regulations, Part 62, Subpart D, when adopted. Should any provision of Subpart D be inconsistent with this agreement, the regulatory provision will be controlling.

(App. 33a). Although Tyrrel may have agreed to be bound by any changes made to this provision of the C.F.R. while he was subject to the agreement as mentioned above, Tyrrel was no longer subject to the agreement as a result of its expiration after February 15, 1989. Tyrrel's participation had automatically ended and he was no longer subject to the agreement.

Therefore, the amendment may have applied to a participant in the program, but as of April 3, 1989, Tyrrel was no longer a participant and not affected by the amendment.

If the amendment is found to be applicable to Tyrrel, the May 15 deadline would have to be the last day of both Tyrrel's participation and the tolling period. As the provision of the SRP cited under Part B of this brief states "should any provision of Subpart D [Title 42, Code of Federal Regulations, Part 62] be inconsistent with this agreement, the regulatory provision will be controlling." This clearly indicates that the matching deadlines as set forth in the regulatory provisions are to control over the provision in the statute referring to the Secretary determining when a person is no longer an SRP participant. The CFR is to provide guidelines to regulate the SRP and its provisions control if inconsistent with those of the SRP agreement. Since the deadline provisions in the regulatory statute control, the Secretary could only determine that Tyrrel's participation in the SRP had concluded on May 15, 1989 at the latest. In fact, the Secretary makes no determination at all, rather it is the regulatory statute which determines when a person ceases to be a participant. Once the May 15 deadline passed with no activity by Tyrrel, the Secretary knew Tyrrel had ceased being a participant and was liable for the full amount of his scholarship debt. As a result, the statute was tolled until May 15, 1989, when Tyrrel ceased being a participant in the SRP. The limitations period would have ended on August 13, 1994; thus, Respondent's claim, filed on September 27, 1994, was barred by the applicable statute of limitations.

In addition, a 1991 amendment to 42 C.F.R. §62.73(f) changed the wording of the 1989 version to state if a person fails to match to a site within the established time frames, "the Secretary will determine **that** such individual is no longer relieved of their liability." 42 C.F.R. §62.73(f) (1995). (App. 25a). The re-wording of this regulation shows the agency's intent for the Secretary's determination to be made by the entrant failing to meet the program deadlines. This amended provision evidences that once a participant fails to meet the deadlines, he is no longer considered to be in the SRP and the statute of limitations recommences. The regulation fails to state "the Secretary will determine **if** an individual is no longer participant" or ". . . that an individual **will be relieved** . . . ." In fact, the language used by the agency failed to grant any discretion under the revised regulation. "Plain meaning of language controls statutory interpretation 'since there is a strong presumption that Congress expresses its intent through the language it chooses.'" *United States v. Westerband-Garcia*, 35 F.3d 418, 420-21 (9th Cir. 1994). This is even more plausible since it is a regulatory amendment in which the agency could have explicitly stated that the Secretary, not the deadlines, had the ultimate authority, but it declined to do so. Although the amendment is not applicable to Tyrrel's agreement, the effect of the amendment on the case at hand is to show the intent of the agency to conform the language of the regulations with the tolling provision of the statute, thus making the failure to meet the deadline the Secretary's determination that the statute is speaking of. Moreover, while the statute expressly grants the Secretary discretion to exclude an individual as a participant for incompetence, it fails to contain a similar provision granting the Secretary any authority to extend the deadlines for matching.

See 42 C.F.R. §62.73(h) (1989). (App. 21a).

B. Respondent did not have the authority to unilaterally extend the statute of limitations tolling period.

The effect of the Court of Appeals' decision (and that of the district court) is to permit unilateral modification of the original contract by the United States, thus extending Tyrrel's participation in the SRP and, in turn, the SRP-related tolling provision, from February 15, 1989 through June 23, 1989. Not only does this result violate contract principles, it also directly contravenes the statutorily-mandated limitations period and established case law. Absent any express contract provisions providing otherwise, Tyrrel failed to bargain for or agree to any unilateral extensions in the SRP contract.

The decision of the U.S. Court of Appeals in *United States v. Commodities Export Co.* directly controls this case. 972 F.2d 1266 (Fed. Cir. 1992), *cert. denied*, 507 U.S. 910 (1993). (App. 37a). In *Commodities*, the government attempted to apply regulations, adopted by the agency after it had entered into the contract with Commodities, to toll the six-year statute of limitations set forth in 28 U.S.C. §2415. *Id.* at 1268. In finding against the government, the court reasoned that without agreement of the parties or statutory obligations delaying institution of suit, section §2415 applies. *Id.* at 1271. The Court stated further "[t]his court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations." *Id.*

The present case is analogous to *Commodities*. Nowhere in the contract or the applicable statutes are there provisions for delaying institution of any lawsuit. Therefore, unilateral implementation by the government of provisions into the SRP contract, without the consent of Tyrrel, are impermissible and unenforceable.

While *Commodities* is analogous to the present case, another case, *United States v. Maldonado*, is similar yet distinguishable. 867 F. Supp. 1184, 1193 (S.D. N.Y. 1994). In that case, the court interpreted an NHSC contract which contained a provision for a one-year grace period for repayment after a borrower was held in default. *Id.* The court decided in favor of the government. *Id.* at 1199. The distinguishing feature was that the parties had contracted for the grace period, as it was expressly provided for in the contract. *Id.* The contract in this case lacked any express provisions allowing for any discretion to lengthen the deadline period, much less for a set grace period.

A third related case is *United States v. Becker*, which involved a doctor defaulting on his NHSC student loans. 995 F.2d 779 (7th Cir. 1993). The court's decision centered around language in his contract which stated "[t]he awardee agrees to comply with . . . regulations . . . and policies in effect at the time of this award." *Id.* at 782. The Court reasoned this language bound the doctor, not the government, to find a qualified position under the program. However, in the present case, no dispute exists as to whose obligation it was to find Tyrrel a "match" under the SRP. Instead, the dispute arises with regard to provisions relating to the tolling of the statute of

limitations.

Tyrrel could not stall re-commencement of the statute after he failed to meet the SRP deadlines. Likewise, the United States cannot unilaterally extend the tolling provision of the SRP merely by sending a letter at its convenience where the contract fails to expressly or impliedly grant the United States the ability to manipulate its terms at will. The June 23 letter sent to Petitioner by Respondent states "[s]ince the deadline for matching to an SRP Option 2 site has passed, you no longer have the opportunity of serving under the SRP." (App. 53a). This statement evidences that once the deadline has passed, the agency considered Tyrrel to no longer be a participant in the SRP and to be liable for the full amount of his scholarship obligation. The tolling provision was de-activated and the limitations period began to run again on February 16, 1989 (or arguably May 16, 1989), once Tyrrel was statutorily deemed to have ceased participating in the SRP, not on June 23 when the agency arbitrarily decided to send a letter to Tyrrel confirming that his participation in the program had expired some time earlier. Therefore, the limitations period expired on June 13, 1994 (or arguably August 13, 1994). *See* Timeline (App. 52a).

In *Crown Coat Front Co. v. United States*, the Supreme Court described 28 U.S.C. §2415 as "a statute aimed at equalizing the litigative opportunities between the government and private parties." 386 U.S. 503, 521 (1967). The Court further reasoned equality is not served by allowing the government to unilaterally postpone accrual of a cause of action where a private litigant would not be able to stall the proceedings. *Id.* at 521, n.14. This displays the reasons for and

importance of statutes of limitations. By adopting the district court's decision, the Court of Appeals not only allowed the government to add provisions to the SRP contract after Tyrrel executed it but has also controverted the purpose of the statute.

CONCLUSION

A court of appeals must review a lower court's decision *de novo*. The Court of Appeals, in its opinion issued November 13, 1996 and its order denying rehearing *en banc* dated January 13, 1997, offered absolutely no indication or analysis of the bases of its conclusion to affirm the District Court's decision. Mere adoption of the District Court's decision does not constitute a *de novo* review. In addition to failing to apply the correct standard of review, the Court of Appeals (as did the District Court) disregarded the express provisions of the SRP contract and its governing regulations and erroneously affirmed summary judgment in favor of the United States, whose cause of action is barred by the statute of limitations as a matter of law. It is of utmost importance that this Court recognize the misapplication of the law governing how a trial judge is to view evidence when considering a motion for summary judgment and the manner in which an appellate court is to review the granting of a similar motion. The Court of Appeal's decision flies in the face of well-established common law contract principles and federal case law and wholly fails to address the tolling of the statute of limitations issue. The case is inconsistent with the decisions of the Federal Circuit and if not reconsidered will result in a split of authority between the circuits. By failing to properly review the district court's decision, the decision of the Court of Appeals improperly

affirms the incorrect application of summary judgment standards and renders the statute of limitations defense, enacted by the legislature to ensure equality and fairness among litigants, meaningless. For these reasons, this Court should grant Petitioner's writ and resolve these competing interpretations of the law before the schism between the circuits, created by the District Court's and Fifth Circuit's decisions, grows wider.

Respectfully submitted,

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APPENDIX A -- ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION ENTERED JANUARY 22, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. H-94-3317.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT T. TYRREL, M.D.,

Defendant.

ORDER

Entered: January 22, 1996

The Government brought suit to collect a debt owed by Defendant Dr. Robert Tyrrel for allegedly failing to honor an obligation he incurred in return for two years of scholarship awarded under the National Health Service Corps ("NHSC") Scholarship Program (hereinafter the "Program") and a

surcharge pursuant to 28 U.S.C. § 3011.[1] The Program paid for two years of his medical school education, and in return, Defendant incurred an obligation to serve for two years as a physician in a health professional shortage area designated by the Secretary of Health and Human Services (hereinafter the "Secretary"). The parties have submitted cross-motions for summary judgment now before the Court.

The Government contends Defendant failed to comply with the terms and conditions of the Program for deferring physician service by switching residency programs without approval of the NHSC. The Government seeks to recover triple damages plus interest for an alleged breach of contract by Defendant.[2] Defendant contends the numerous defenses raised in his Answer and Motion for Summary Judgment render the Government's Motion for Summary Judgment inappropriate and require the granting of his Motion for Summary Judgment. For the following reasons the Government's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

BACKGROUND

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1. The Program was established by Section 751 et seq. of the Public Service Health Act, currently codified at 42 U.S.C. §§ 254 et seq.

2. Failure to comply with the terms and conditions of deferment pursuant to 42 C.F.R. § 62.10(a) allows the United States to collect as damages three times the principle amount of the scholarship plus interest. 42 U.S.C. § 254o(b) (1) (A).

Appendix A

Robert Tyrrel entered medical school in 1979 at the University of Texas Health Science Center in Houston, Texas, and graduated in 1983. He received financial assistance through the Program during his first and second years of medical school totalling $14,865.00. Under the Program's agreement, Defendant incurred an obligation to serve one year for each year of financial assistance as a physician at a designated health professional shortage area.

Under the Program, the service obligation is to begin upon the completion of the scholarship recipient's academic training. However, upon request and approval of the Secretary, scholars who entered a scholarship contract prior to October 1, 1985 may defer their service obligation for a period of time not to exceed three years without the Secretary's approval to complete a residency program. Scholarship recipients who do not intend to enter a residency program that can be completed within the deferment period are required to complete at least one year of approved graduate training before beginning the period of obligated service. Under 42 C.F.R. § 62.9(c) scholarship recipients are required to submit a written request to the Secretary before changing the length or type of approved graduate training.

Prior to Defendant's graduation in May 1983, the NHSC issued a Deferment Information Bulletin ("DIB") explaining the procedure for requesting deferment of a scholar's service obligation. The DIB stated that the Program would only grant four year deferments for scholars choosing an obstetrics-gynecology (OB/GYN) or psychiatry residency training

program, since both required four years of training for board certification and the Secretary had determined the Program had a need for these types of practitioners. The letter advised that residency programs other than OB/GYN and psychiatry which required more than three years to complete would not be approved for deferment, and scholarship recipients who pursued such specialties would be subject to the breach provisions of their scholarship contracts.

At Defendant's request, the Secretary deferred his service obligation from July 1, 1983 through June 30, 1984, in order to allow him to pursue the first year of a four year residency training program in OB/GYN, which he was scheduled to complete in July 1987.

In April 1984, after completing one year of OB/GYN residency training, Defendant submitted a deferment request form for the period beginning July 1, 1984 through June 30, 1985. Defendant indicated that he had changed residency training programs from OB/GYN to radiology, to be completed in July, 1988, and would be moving to San Antonio, Texas, where the residency program was located. Defendant had not received approval from the Program to extend his period of deferment to five years or to change his residency to radiology.

In July 1984, the Secretary notified Defendant by letter that his request for a four year deferment to complete radiology training could not be approved--there was not a need for radiologists in the Program. Due to Defendant's failure to comply with the deferment policies established by the NHSC Scholarship Program, the Secretary informed Defendant that he

was in default of his scholarship obligation and would receive a letter describing his financial liability.

In May 1985, after evaluating Defendant's financial condition, the Secretary informed him that a repayment plan had been developed under which he could repay his obligation through a Repayment Agreement at $150.00 per month beginning August 1, 1985. Defendant failed to sign the agreement but did submit payments totalling $1,040.00 beginning December 20, 1984 through September 28, 1987.

In October 1985, the Secretary notified Defendant that he was past due on his obligation, and that submitting payments without executing the Repayment Agreement would not preclude referral of his account to a private collection agency or the Department of Justice. Defendant again failed to sign the Repayment Agreement.

In August 1987, the Secretary sent a letter to Defendant notifying him that this account was being referred to the Internal Revenue Service for offset of his income tax refund. The letter informed Defendant that he had sixty days to present evidence that all or part of his debt was not delinquent or not legally enforceable. Defendant failed to respond and his refund was offset in the amount of $2,370.00

In February 1988, the NHSC informed Defendant he was eligible to repay his obligation through a Special Repayment Plan ("SPR") authorized under Pub. L. 100-177 § 204(a). Under the SRP eligible defaulters are given the opportunity to satisfy their indebtedness through service at a site of their choice from an NHSC list. Defendant signed an

SRP Option II Agreement on April 26, 1988, and agreed to arrange employment at a site on the NHSC's Supplemental Health Manpower Shortage Area Placement Opportunity List. Under the SRP, Defendant had the option to serve 150% of his remaining service obligation or serve 100% of his remaining service obligation and pay an amount equal to the scholarship support received. The Option II Agreement was approved by the NHSC on June 30, 1988.

Defendant, through his attorney, received site lists in May and October 1988. In April 1989, the Secretary notified Defendant's attorney that the deadline for selecting a site under Option II of the SRP had been extended until May 15, 1989, and warned Defendant that this was the last opportunity to choose a site. Defendant failed to choose a site under the SRP Option II.

On June 23, 1989, the Secretary informed Defendant, through his attorney, that the May 15, 1989 deadline had passed and that his participation in the SRP had ended. In the same notice, the Secretary offered Defendant a final opportunity to serve his obligation though the Indian Health Service. Defendant failed to respond.

In October 1989, the Secretary notified Defendant that his case would be referred to the Department of Justice, and he was instructed to contact the Division of Fiscal Services to address repayment of his debt. Defendant failed to respond.

In November 1990, Defendant's counsel requested administrative review of Defendant's default status. By letter dated March 28, 1991, the Division of Fiscal Services informed Defendant, through his attorney, a determination was made that

Defendant was correctly placed in default of his NHSC Scholarship Program obligation. The letter further stated that if Defendant failed to arrange payment within thirty days from the date of the letter Defendant's account would be referred to the Department of Justice. Defendant failed to respond. Defendant owes $143,546.44 as of March 10, 1995.

ESTOPPEL

Defendant raises the affirmative defense of estoppel to prevent the Government's collection efforts. "Equitable estoppel requires (1) a material misrepresentation or concealment (2) made with actual or constructive knowledge of the true facts (3) with the intent that the misrepresentation or concealment be acted upon (4) by a third party without knowledge or means of knowledge of the true facts (5) who detrimentally relies or acts on the misrepresentation or concealment." In re Christopher, 28 F.3d 512, 520 (5th Cir. 1994) (citing Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 371 n.4 (5th Cir. 1990)). Defendant has failed to develop the affirmative defense further alleging the doctrine. Thus, this defense fails.

WAIVER

Defendant asserts that the Government waived its right to collect on the obligation. Waiver may be established by showing that the party actually intended to relinquish a known right or privilege. In re Christopher, 28 F.3d at 520-521. Defendant has failed to allege that the NHSC intended to relinquish their right to recover on the obligation. The record

reflects that the Secretary made numerous attempts to recover from Defendant without court intervention; thus, this affirmative defense fails.

DUE PROCESS

Defendant claims the agency's actions infringed on his constitutional rights by taking property without following due process of law. Defendant has failed to identify a property interest or a taking.

STATUTE OF LIMITATIONS

Defendant claims this case is barred by the applicable statute of limitations. An action for money damages brought by the United States founded on an express or implied contract shall be barred unless the complaint is filed within six years after the right of action accrues. 28 U.S.C. § 2415(a). However, in the event of later partial payment or written acknowledgment of the debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment. Id.

Defendant's last voluntary payment was made on September 28, 1987. The statute of limitations would have expired on September 28, 1993, six years from the date of Defendant's last payment, except that the limitations period was tolled during Defendant's participation in the Special Repayment Plan ("SRP"). "If an individual provides notice under paragraph (3) [to participate in the SRP], the statute of limitations established by section 2415 of title 28, United States

Code, shall be tolled from the time the Secretary receives such notice until such time as it is determined by the Secretary that such individual will not be relieved of liability to the United States under the Public Health Service Act as provided under this section." Pub. L. 100-177 § 204(a) (4), 101 Stat. 1000 (1987).

On June 2, 1988, the agency received Defendant's notice to participate in the SRP. On June 23, 1989, the Secretary determined that Defendant's participation in the SRP was concluded. Thus, the statute of limitations was tolled form June 2, 1988, through June 23, 1989, for a total of 387 days. The effect of this tolling was to extend the statute of limitations from September 28, 1993 to October 19, 1994. Plaintiff's Complaint was filed on September 27, 1994, well within the limitations period.

ILLEGAL AGENCY ACTION

Defendant claims the agency's decision to place him in default of his obligation was illegal. The Court has authority to overturn the Secretary's declaration of default and deny the Government's claim for damages only if the Government's actions were "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A). There is no evidence to indicate that the Secretary's action was arbitrary or capricious.

The Supreme Court has instructed the courts to give substantial deference to an agency's interpretation of its own regulations. Thomas Jefferson Univ. v. Shalala, ---U.S.---,

114 S. Ct. 2381, 2386 (1994). The DIB clearly stated the agency's position on deferment and ramifications if the guidelines were not followed. Defendant's actions were in direct violation of the DIB and the decision to hold the Defendant in default was the course of action the agency announced it would take.

Defendant further argues that the agency failed to consider assigning him to a "mutually acceptable position" prior to placing him in default. However, Defendant's decision to pursue an unapproved residency program constituted a breach of the terms and conditions of deferment. See, United States v. Conway, 696 F. Supp. 571, 572 (E.D. La. 1988), aff'd, 868 F.2d 1269 (5th Cir. 1989) (Doctor insisted on fulfilling her service obligation upon completion of her residency in ophthalmology in the hospital of her choice when the Program had no need for ophthalmologists. The court determined that to permit a scholar recipient to decide what service will be rendered and where it could be rendered would result in absolute chaos in the Program and is intolerable.); United States v. Swanson, 618 F. Supp. 1231 (E.D. Mich. 1985) (Scholarship recipient was placed in default when he did not begin service in accordance with is contract, and instead elected to pursue a nondeferable surgical residency.). Defendant's deferment request clearly indicates that he intended to pursue the four year radiology residency training program. Assigning Defendant would have been a futile act of the Secretary.

Additionally, Defendant asserts the agency ignored his offer

Defendant's obligations under the NHSC Program are based on statutory provisions and are not negotiable. The agency is without authority to substitute the services of one physician for another.

CONCLUSION

The Court finds that Defendant breached his scholarship agreement. On the Motion of the United States for Summary Judgment against Defendant Dr. Robert Tyrrel, the Court finds that there is no genuine issue as to any material fact, and that the United States therefore is entitled to judgment as a matter of law. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (entry #21) is **DENIED** and Plaintiff's Motion for Summary Judgment (entry #10) is **GRANTED**. An appropriate final order consistent herewithin shall be issued this day.

Signed this 19th day of January, 1996 at Houston, Texas.

s/_____
NORMAN W. BLACK
CHIEF JUDGE

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. H-94-3317.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT T. TYRREL, M.D.,

Defendant.

FINAL ORDER

Entered: January 22, 1996

In accordance with the Court's ORDER issued this day, it is hereby

ORDERED that the United States have judgment against the Defendant in the amount of $149,588.14, plus a 10% surcharge on the judgment authorized under 28 U.S.C. § 3011, plus interest at the legal rate of 5.16% per annum from the date of judgment until paid in full.

Appendix A

THIS IS A FINAL ORDER

Signed this 19th day of January, 1996 at Houston, Texas.

s/_____
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX B -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ENTERED NOVEMBER 13, 1996

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 96-20187

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT T. TYRREL, M.D.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (CA-H-94-3317)

Before

Garza, Jones, and DeMoss

Circuit Judges.

Per Curiam.

Appendix B

Before REYNALDO G. GARZA, JONES, and DeMOSS, Circuit Judges.

PER CURIAM:*

Finding no error or law or fact in the district court's judgment, this court AFFIRMS on the basis of the district court's order entered January 22, 1996.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON SUGGESTION FOR REHEARING EN BANC ENTERED JANUARY 13, 1997

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 96-20187

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT T. TYRREL, M.D.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON

Before

Garza, Jones, and DeMoss

Circuit Judges.

Per Curiam.

Appendix C

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is **DENIED**. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is **DENIED**.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is **DENIED**. The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is **DENIED**.

ENTERED FOR THE COURT:

s/_____
United States Circuit Judge

REHG-6

APPENDIX D -- 42 C.F.R. §62.72 - 62.74 (1989)

§ 62.72 Definitions.

In addition to the definitions in § 62.2 of this Part, the following definitions will apply for purposes of this subpart:

"Prior approved service" means service performed prior to a Program participant's service start date under the Special Repayment Program (1) as a member of the National Health Service Corps pursuant to an assignment by the Secretary under section 333 of the Act, (2) under a written private practice option agreement signed by the Secretary pursuant to section 338D of the Act, or (3) in compliance with section 338C(e) of the Act.

"Eligible defaulters" means those individuals who, as of November 1, 1987, were: (1) in breach of a written contract entered into under section 338A of the Act and liable to the United States under section 338E(b) of th Act and/or in breach of a written contract entered into under section 225 of the Act (as in effect on September 30, 1977) and liable to the United States under section 225(f)(1) of the Act (as in effect on September 30, 1977), and (2) not already serving their obligations on December 1, 1987, under a judgement, forbearance agreement, or other written agreement to serve.

"HPOL" means the Health Manpower Shortage Area Placement Opportunity List described in section 204(b) of Pub. L. 100-177.

"Match" means that the Secretary has received documentation of (1) an offer of employment from a site which specifies at least the agreed upon salary and start date, and (2) the Program participant's acceptance of that offer. Provided, however, that if the Program participant would be

self-employed, a "match "means that the Secretary has approved a program participant's private practice option application under section 338D(a) of the Act.

"Program participant" means an eligible defaulter whose contract under section 204 of Pub. L. 100-177 has been accepted and signed by the Secretary.

"SHPOL" means the Supplemental Health Manpower Shortage Area Placement Opportunity List described in section 204(d) of Pub. L. 100-177.

"Scholarship amount" means the sum of any amounts paid to, or on the behalf of, a scholarship recipient under the PH/NHSC Scholarship Training Program and/or the Scholarship Program.

"Special Repayment Program" or "Program" means the program authorized by section 204 of Pub. L. 100-177.

"Total debt" means the debt that would be owed by a Program participant under section 225(f)(1) of the Act, as in effect on September 30, 1977, and/or section 338E(b) of the Act, as if no payments had been made on the debt.

§ 62.73 What are the procedures for participation in the Special Repayment Program?

(a) *Notice of eligibility for participation in the program.* On or before February 29, 1988, the Secretary will, subject to paragraph (h) of this section, send written notice to each eligible defaulter of the opportunity provided under this Program. The notice will be sent to the last known address of each eligible defaulter and will describe the special repayment

options available under the Program.

(b) *Selection of repayment method.* On or before May 29, 1988, eligible defaulters who wish to participate in this Program must notify the Secretary of their intent to enter into a written contract to provide service in accordance with either section 204(b) or section 204(c) of Pub. L. 100-177. The election between section 204(b) and section 204(c) of Pub. L. 100-177 is binding on the eligible defaulters.

(c) *Service sites.* Eligible defaulters who enter into a written contract to serve under section 204 of Pub. L. 100-177 will receive a listing of approved sites appropriate to the service option they have selected. Program participants electing service under section 204(b) of Pub. L. 100-177 will receive a HPOL. Program participants electing service under section 204(c) of Pub. L. 100-177 will receive a SHPOL. The HPOL or SHPOL sent to the Program participant will be specific to the Program participant's profession and his or her specialty training, which is most needed by the National Health Service Corps. The Secretary is not required to identify placements for Program participants in a medical specialty for which the National Health Service Corps has no need.

(d) *Time frames for matching and commencing service.* If a Program participant electing to serve under section 204(b) of Pub. L. 100-177 chooses to serve at a remaining site on the 1988 HPOL, such particpant must match to a site and must begin serving at the site by October 1, 1988. If a Program participant electing to serve under section 204(b) of Pub. L. 100-177 chooses to serve at a site on the 1989 HPOL, such participant must match to a HPOL site by February 15, 1989,

and must begin service at the site by October 1, 1989. If a Program participant has elected to serve under section 204(c) of Pub. L. 100-177, such participant will have until May 15, 1989 to match to a SHPOL site and must begin service at that site by October 1, 1989.

(e) *Site vists.* The Program participant is responsbile for the costs of any site vist(s) and any other contact with the site to obtain employment at the site.

(f) *Effect of failure to meet established time frames.* If a Program participant does not match to a site or begin service at that site within the time frames described in paragraph (d) of this section, his or her participation in the Special Repayment Program will be automatically ended and he or she will remain liable for the full scholarship debt(s), including accrued interest and/or damages.

(g) *Service.* Service must be performed in accordance with subpart II of Part D of Title III of the PHS Act. Service credit will begin after a Program participant has matched to a HPOL or SHPOL site and has commenced service at that site in accordance with subpart II of Part D of Title III of the PHS Act.

(h) *Secretary's exclusion authority.* The Secretary is authorized, at any time, to deny or terminate an individual's participation in the Program for reasons related to the individual's professional competence or conduct.

Appendix D

§ 62.74 How much credit will a Program participant receive for monetary repayments made, or for approved service performed, before beginning service under the Special Repayment Program?

(a) Prior approved service performed by a Program participant will be credited to the Program participant for the purpose of calculating the Program participant's remaining service obligation under this Program. Thus, the Program participant's remaining service obligation will be calculated by subtracting the number of days of the Program participant's prior approved service from the number of days of the Program participant's original service obligation under the PH/NHSC Scholarship Training Program and/or the Scholarship Program. If a Program participant has made monetary payments, his or her remaining service obligation will be reduced by converting the monetary payments into days of service credit as set forth in paragraph (b) or (c) of this section, whichever is applicable.

(b) Program participants who elect to serve pursuant to sections 204(b) and 204(c)(2) of Pub. L. 100-177, will not receive a refund of any amounts previously paid but will receive service credit for those payments as follows:

(1) The number of days of service credit will be calculated by dividing the total amount paid by the Program participant prior to the Program participant's service start date by the totatl debt as of the service start date and multiplying the result of that division by the number of days of the participant's remaining service obligation (as determined by the formula set forth in the second sentence of paragraph (a) of this section).

(2) If the Program participant defaults on a contract under this Program, prior monetary payments will not be credited to service but will be applied to the monetary debt owed by the Program participant.

(c) Program participants who elect to serve under section 204(c)(1) of Pub. L. 100-177 must pay an amount equal to the scholarship amount. Any amounts paid by the Program participant prior to or after entry into the Program, in accordance with § 62.76 of this subpart, will be used to reduce the Program participant's financial obligation incurred under section 204(c)(1) of Pub. L. 100-177. In some cases, the amounts paid before or after entry into the Program will exceed the scholarship amount. These payments in excess of the scholarship amount will be converted into days of service credit under the formula set forth in paragraph (b)(1) of this section. If a Program participant defaults on a contract under this option, the monies paid in excess of the scholarship amount will not be credited to service but will be credited toward the monetary debt owed by the Program participant under section 338E(b) of the Act or section 225(f)(1) of the Act, as in effect on September 30, 1977. The scholarship amount paid upon entering this option will be forfeited.

APPENDIX E – 42 C.F.R. §62.73 (1995)

§ 62.73 What are the procedures for participation in the Special Repayment Program?

(a) *Notice of eligibility for participation in the program.* On or before February 29, 1988, the Secretary will, subject to paragraph (h) of this section, send written notice to each eligible defaulter of the opportunity provided under this Program. The notice will be sent to the last known address of each eligible defaulter and will describe the special repayment options available under the Program.

(b) *Selection of repayment method.* On or before May 29, 1988, eligible defaulters who wish to participate in this Program must sign and submit to the Secretary a written contract to provide service in accordance with either section 204(b) or section 204(c) of Pub. L. 100-177. The election between section 204(b) and section 204(c) of Pub. L. 100-177 is binding on the eligible defaulters.

(c) *Service sites.* Program participants will receive a listing of approved sites appropriate to the service option they have selected. Program participants elecing service under section 204(b) of Pub. L. 100-177 will receive a HPOL. Program participants electing service under section 204(c) of Pub. L. 100-177 will receive a SHPOL. The HPOL or SHPOL sent to the Program participant will be specific to the Program participant's profession and his or her specialty training which is most needed by the National Heatlh Service Corps. The Secretary is not required to identify placements for Program participants in a medical specialty for which the National Health Service Corps. has no need.

Appendix E

(d) *Time frames for matching and commencing service.* If a Program participant electing to serve under section 204(b) of Pub. L. 100-177 chooses to serve at a remaining site on the 1988 HPOL, such participant must match to a site and must begin serving at the site by October 1, 1988. If Program participant electing to serve under section 204(b) of Pub. L. 100-177 chooses to serve at a site on the 1989 HPOL, such participant must match to a HPOL site by February 15, 1989, and must begin service at the site by October 1, 1989. If a Program participant has elected to served under section 204(c) of Pub. L. 100-177, such participant must match to a SHPOL site by May 15, 1989, and must begin service at that site by October 1, 1989.

(e) *Site visits.* The Program participant is responsible for the costs of any site visit(s) and any other contact with the site to obtain employment at the site.

(f) *Effect of failure to meet established time frames.* If a Program participant does not match to a site or begin service at that site within the time frames described in paragraph (d) of this section, the Secretary will determine that such individual is not relieved of his or her liability to the United States under the PH/NHSC Scholarship Training Program and/or Scholarpship Program (including accrued interest and/or damages).

(g) *Service.* Service must be performed in accordance with subpart II or part D of title III of the Act. Service credit will begin after a Program participant has matched to a HPOL or SHPOL site and has commenced service at that site in accordance with supart II of part D of title III of the Act.

(h) *Secretary's exclusion authority.* The Secretary is authorized, at any time, to deny or terminate an individual's participation in the Program for reasons related to the individual's professional competence or conduct.

APPENDIX F -- 28 U.S.C. §2415(a) (1994)

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative porceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgement of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provide further*, That an action for money damages broght by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year

after the Secretary of the Interior has punlished in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

APPENDIX G -- PUBLIC HEALTH SERVICE AMENDMENTS OF 1987, PUB. L. NO. 100-177, Sec. 204(a)(4), 100 STAT. 986 (CODIFIED AS AMENDED IN SECTIONS OF 42 U.S.C.)

(4) Statute of Limitations. -- If an individual provides notice under paragraph (3), the statute of limitations established by section 2415 of title 28, United States Code, shall be tolled from the time the Secretary receives such notice until such time as it is determined by the Secretary that such individual will not be relieved of liability to the United States under the Public Health Service Act as provided under this section.

APPENDIX H -- OPTION II --SPECIAL REPAYMENT PROGRAM AGREEMENT DATED APRIL 26, 1988

OPTION 2
SPECIAL REPAYMENT PROGRAM AGREEMENT

Section 204 of Public Law 100-177 establishes a Special Repayment Program which authrozies the Secretary of Health and Human Services ("Secretary") to relieve individuals of their financial liability under section 338E(b) of the Public Health Service ("PHS") Act and/or section 225(f) (1) of the PHS Act, as in effect on September 30, 1977, if those scholarship recipients provide services in sites on the Supplemental Health Manpower Shortage Area Placement Opportunity List ("SHPOL") developed by the Secretary. The terms and conditions of participating in the Special Repayment Program under this option are set forth below.

Section A -- Obligations of the Secretary

The Secretary agrees to:

1. Provide, on or about August **[illegible]**, 1988, the undersigned scholarship recipient with a list of the appropriate sites on the 1989 SHPOL.

2. Utilize the undersigned scholarghip recipient to provide health services in accordance with the terms of this agreement.

3. Relieve the undersigned scholarship recipient of his/her

Appendix H

4. liability under section 338E(b) of the PHS Act and/or 225 (f) (1) of the PHS Act, as in effect on September 30, 1977, when the undersigned scholarship recipient completes his/her remaining service obligation(s) in accordance with the terms of this agreement.

Section B -- Obligations of the Scholarship Recipient

The undersigned scholarship recipient agrees to:

1. Serve in the full-time clinical practice of his/her profession in accordance with subpart II of part D of title III of the PHS Act at a site (a) which is on the 1989 SHPOL provided by the Secretary and (b) which has agreed to accept the undersigned scholarship recipient's services.

2. Match to a site on the 1989 SHPOL by February 15, 1989, and begin service, in accordance with section B.1. of this agreement, at that site by October 1, 1989. A match will occur when the Secreatry has received written documentation of: (1) an offer of employment from the site which specifies, at a minimum, the agreed upon salary and start date and (2) the undersigned scholarship recipient's acceptance of that offer. If the undersigned scholarship recipient would be self-employed, a match will occur upon the Secretary's approval of the undersigned scholarship recipient's

private practice option application under section 338D(a) of the PHS Act.

3. (a) Serve 150% of his/her remaining service obligation(s) under section 338C of the PHS Act and/or section 225 of the PHS Act, as in effect on September 30, 1977, in the order in which they were incurred.

OR

(b) Serve 100% of his/her remaining service obligation(s) under section 338C of the PHS Act and/or section 225 of the PHS Act, as in effect on September 30, 1977, in the order in which they were incurred and pay to the United States the sum of the amounts paid to, or on behalf of, the undersigned scholarship recipient under section 338A of th PHS Act and/or sections 225(c) and (d) of the PHS Act, as in effect as of September 30, 1977. Full payment of this amount must be recieved by the United States at least 60 days prior to the undersigned scholarship recipient's commencement of service in accordance with section B.1. of this agreement. If payment is not received by that date, the undersigned scholarship recipient must serve for the **[illeglible]** of time set forth in subparagraph (a) of this paragraph any amounts paid by the undersigned scholarship recipient prior to entering into this agreement shall be used to reduce any amount owed

under this subparagraph. The amount paid under this subparagraph is nonrefundable.

4. Comply with the provisions of Title 42, Code of Federal Regulations, Part 62, Subpart D, when adopted. Should any provision of Subpart D be inconsistent with this agreement, the regulatory provision will be controlling.

Section C -- Breach of the Special Repayment Program Agreement

If the undersigned scholarship recipient:

1. For any reason, fails to match to a SHPOL site within the time frame specified in section B.2. of this agreement or, after matching to a site, fails to commence service at that SHPOL site within the time frame specified in section B.2. of this agreement, the undersigned scholarship recipient will not be relieved of any protion of his/her liability under section 338E(b) of the PHS Act and/or section 225(f) (1) of the PHS Act, as in effect on September 30, 1977.

2. Commences but fails, for any reason, to complete a remaining service obligation under section 225 of the PHS Act, as in effect on September 30, 1977 (including any additional months of service incurred pursuant to

section B.3. (a) of this agreement), the undersigned scholarship recipient will not be relieved of any portion of his/her liability under section 225(f) (1) of the PHS Act, as in effect on September 30, 1977.

3. Commences but fails, for any reason, to complete a remaining service obligation under section 338C of the PHS Act, the undersigned scholarship recipient will receive credit for partial service such that the amount of his/her debt owed under section 338E(b) will be calculated in accordance with the following formula:

$$A=3\ 0\ \frac{[t-(s+\frac{1}{2}r)]}{t}$$

In which:

'A' is the amount the United States is entitled to recover,

'0' is the sum of the amounts paid to or on behalf of the undersigned scholarship recipient and the interest on such amounts which would be payable if at the time the amounts were paid they were loans bearing interest at the maximum legal prevailing rate, as determined by the Treasure of the United States.

't' is the total number of months in the undersigned

scholarhips recipient's period of obligated service (including any additional months of service incurred pursuant to section B.3.(a) of this agreement),

's' is the number of months of approved service performed by the undersigned scholarship recipient prior to entering into this agreement, and

'r' is the number of months of service performed by the undersigned scholarship recipient in compliance with this agreement.

4. Fails to complete the remaining service obligation(s), any amounts previously paid by the undersigned scholarship recipient to the United States, except amounts paid pursuant to section B.3.(b) of this agreement, will be applied to the undersigned scholarship recipient's debt under section 338E(b) of the PHS Act and/or section 225(f) (1) of the PHS Act, as in effect on September 30, 1977.

Section D -- Exclusion from the Special Repayment Program

The Secretary may, at any time, exclude an individual from relief from liability under this agreement for reasons related to the individual's professional competence or conduct.

The Secretary or his authorized representative must sign this

contract before it becomes effective.

s/_____
Scholarship Recipient (Please Print)

s/_____ _____
Scholarship Recipient's Signature Date

s/_____ _____
Secretary of Health and Human Services or Designee Date

APPENDIX I -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AUGUST 11, 1992

Nos. 91-1470, 91-1482

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

COMMODITIES EXPORT CO.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES COURT OF INTERNATIONAL TRADE

Before

Archer, Bennett, and Rader

Circuit Judges.

Government brought action to recover unpaid liquidated damages under customs warehouse bond. The United States Court of International Trade, Nicholas Tsouscalas, J., entered judgment in favor of government, and appeal was taken. The Court of Appeals, Rader, Circuit Judge, held that, under

applicable six-year limitations period for actions founded on contract, action was time barred, as Customs' delay in bringing suit until after it had complied with regulations for demanding payment did not affect accrual of action.

Reversed.

Mark S. Sochaczewsky, Atty., Commercial Litigation Branch, Dept. of Justice, New York City, argued, for plaintiff-appellee. With him on the brief, were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office. Also on the brief was Michele L. Kenney, U.S. Customs Service, of counsel.

Roger E. Craig, Naples, Fla., argued, for defendant-appellant, Commodities Export Co. With him on the brief was Walter H. Lubienski, Lubienski & Lubienski, Detroit, Mich. Wayne James Jarvis, Wayne Jarvis, Ltd., Chicago, Ill., argued for defendant-appellant, Old Republic Ins. Co. With him on the brief was Michael G. Hodes, Hodes & Filon, Chicago, Ill., of counsel.

Before ARCHER, Circuit Judge, BENNETT, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

The United States sued Commodities Export Company and Old Republic Insurance Company in the United States Court of

International Trade to recover unpaid liquidated damages under a customs warehouse bond. The trial court entered judgment in favor of the United States. *United States v. Commodities Export Co. & Old Republic Ins. Co.*, CIT No. 89-03-00144, May 14, 1991. Because the United States did not file its action within the six year statute of limitation, 28 U.S.C. § 2415(a) (1988), this court reverses.

BACKGROUND

Section 1557(a) of Title 19 (1988) allows an importer to store imported foreign merchandise in a bonded warehouse for up to five years from the date of importation without paying duties. An importer must pay duties on merchandise removed from storage for consumption within this country. *Id.* An importer pays no duties, however, on merchandise withdrawn from storage for export. *Id.*

Commodities sells both domestic and foreign goods from its duty-free store. This store lies directly adjacent to the Canadian border in Detroit. Commodities stores it merchandise in a bonded warehouse under 19 U.S.C. § 1557(a). As a duty-free sales enterprise, Commodities sells its merchandise in export only. *See* 19 U.S.C. § 1555(b) (1988). Thus, Commodities sells it merchandise to persons immediately leaving the United States to enter Canada. In the event of a sale to persons remaining in the United States, Commodities must collect duties. *See United States v. Commodities Export Co.*, 733 F.Supp. 109, 110 (Ct.Int'l Trade 1990) (*Commodities I*).

"To insure payment of duties and other charges due to

runaways and other infractions," the United States entered into a warehouse bond agreement with Commodities, as principal, and Old Republic Insurance, as surety. *Id.* Under the agreement, Commodities and Old Republic jointly and severally promised to pay liquidated damages of $100 for each violation of the bond's terms. Moreover, they agreed to pay liquidated damages of five times the duty and tax on any dutiable merchandise removed from the warehouse without the Customs Service's approval. The bond required Commodities to mark it merchandise correctly and to notify Customs of any inventory discrepancies.

On February 22, 1983, Customs conducted a spot check of Commodities' warehouse. The investigation revealed that Commodities had not properly marked 37 warehouse entries and had not notified Customs of inventory shortages in seven entries. On March 21, 1983, Customs sent Commodities a demand for payment of liquidated damages for breach of the bond. *See* 19 C.F.R. 172.1(a) (1982). The demand required Commodities to pay $6,293.96 or petition for relief within 60 days. On May 19, 1983, Commodities objected to the assessment of liquidated damages. Customs denied Commodities' petition on November 4, 1987. On November 20, 1987, Customs formally demanded payment by Old Republic within 30 days. On February 20, 1988, March 5, 1988 and March 19, 1988, Customs issued bills to Commodities and Old Republic for payment of the liquidated damages. Neither defendant paid Customs.

Appendix I

On March 17, 1989, the United States brought this action against Commodities and Old Republic to recover the unpaid liquidated damages. The trial court denied defendants' motion to dismiss for lack of subject matter jurisdiction. *Commodities I.* Defendants then moved to dismiss because the statute of limitations had run and because Customs had actually liquidated the goods duty-free. The trial court denied this motion also. *United States v. Commodities Export Co.*, 755 F.Supp. 418 (Ct. Int'l Trade 1991) (*Commodities II*).

At trial, the jury affirmed the validity of the bond agreement and found that Commodities had breached the bond. On May 14, 1991, the court entered judgment in favor of the United States.

DISCUSSION

I.

[1] Section 1582 of Title 28 (1988) sets forth exclusive jurisdiction for the Court of International Trade:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States --
>
> (1) to recover a civil penalty under section 592, 641(b)(6), 641(d)(2)(A), 704(I)(2), or 734(I)(2) of the Tariff Act of 1930;
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

Thus, to fall within the exclusive jurisdiction of the Court of International Trade, this action to recover on a bond must be "commenced by the United States," "arise[ ] out of an import transaction," and "relat[e] to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." *Id.*

[2] The United States' commencement of this action satisfies the first element. The second and third elements require this court to construe the terms "import transaction" and "importation." Specifically this court must determine whether foreign goods in a bonded warehouse are "imported" within the meaning of 28 U.S.C. § 1582(2). The statutes governing bonded warehouses repeatedly refer to warehouse goods as imports. For instance, 19 U.S.C. § 1557(a) permits an importer to store merchandise in a bonded warehouse without payment of duties for up to five years from the date of "importation." Section 1557 thus considers goods imported upon their entry into this country, rather than upon payment of duties before merchandise enters domestic commerce.

Similarly, section 1555(a) of Title 19 -- the statute authorizing Commodities' and Old Republic's bond -- refers to "imported" merchandise in customs bonded warehouses. Thus, goods in bonded warehouses are "imported" upon entry into this country and storage in a bonded warehouse. The importer need pay no duties to "import" merchandise stored in its warehouse. The Supreme Court has adopted the language of

Title 19 in referring to goods in bonded warehouses. *R.J. Reynolds Tobacco co., v. Durham County*, 479 U.S. 130, 134 n. 3, 107 S.Ct. 499, 503 n. 3, 93 L.Ed.2d 449 (1986) ("Goods may remain in a customs-bonded warehouse for up to five years from the date of importation...."); *see also Xerox Corp. v. County of Harris*, 459 U.S. 145, 150, 103 S.Ct. 523, 526, 74 L.Ed.2d 323 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods"); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122, 43 S.Ct. 504, 507, 67 L.Ed. 894 (1923). ("If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.").

In *Stone & Downer Co., v. United States*, 19 CCPA 259, 264 (1931), *cert. denied*, 287 U.S. 619, 53 S.Ct. 20, 77 L.Ed. 538 (1932), this court's predecessor noted that "importation" has a different meaning for the timing of duty payments. *Stoner & Downer* clarified that Title 19 requires Customs to assess duties at the time foreign goods in a bonded warehouse enter into domestic commerce, rather than at the time these goods enter the warehouse. *Id.* In that context, Customs collects duties on "imported" goods upon entry into domestic commerce. Because this appeal does not concern the timing of duty assessments, *Stone & Downer* is not applicable.

By referring to "import transaction" or "importation of

merchandise," 28 U.S.C. § 1582 gave the Court of International Trade jurisdiction over bonded warehouses. The phraseology of section 1582 underscores the breadth of this jurisdictional grant. A civil action need only arise out of an import transaction to fall within the court's jurisdiction. Moreover a bond need only relate to importation. This broad language commits a wide spectrum of controversies concerning the importation process to the Court of International Trade.

The legislative history of section 1582 also supports the breadth of the jurisdictional grant to the Court of International Trade. The House report accompanying the 1980 rewrite of this provision described the court's jurisdiction as "a comprehensive system of judicial review of civil actions arising from import transactions." H.R.Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

Under the terms of 28 U.S.C. § 1582(2), this action against Commodities falls within the jurisdiction of the Court of International Trade. The United States brought the action. Two-thirds of the merchandise in Commodities' warehouse is foreign. By bringing this merchandise into the United States, Commodities conducted an "import transaction." This civil action thus "arises out of an import transaction," satisfying the second jurisdictional requirement of 28 U.S.C. § 1582(2).

[3] Finally, the bond in this case relates to importation in at least two ways. The bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its

warehouse. The bond also ensures payment of duties on imported merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2). The trial court therefore properly exercised jurisdiction over this action.

II.

(4) This court must next determine the statute of limitations which applies to this action. Section 1621 of Title 19 sets forth a five-year limitation on any "suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws." 19 U.S.C. § 1621 (1988). Section 2415(a) of Title 28 provides a six-year limitation on "every action ...brought by the United States or an officer or agency thereof which is founded upon any contract." 28 U.S.C. § 2415(a).

The five-year statute of limitations in 19 U.S.C. § 1621 does not apply in this case because United States does not seek "pecuniary penalt[ies] ...accruing under the customs laws." *See also United States v. Imperial Food Imports*, 834 F.2d 1013, 1016, 6 Fed.Cir. (T) 37, 40 (1987) ("Liquidated damages are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove."). Rather, the United States brought this action to recover liquidated damages under the terms of a contract, the bond agreement. Because

"founded upon [a] contract," this actions falls within the language of 28 U.S.C § 2415. Therefore, the trial court properly applied a limitations period of six years in this case.

III.

Finally this court must decide whether the United States filed this action within the applicable statutory period. Under 28 U.S.C. § 2415(a), the United States may not bring an action "unless the complaint is filed within six years after the right of action accrues."

The trial court determined that the Government's right of action accrued on May 20, 1983, after Customs followed it own regulations. *Commodities II*, 755 F. Supp. at 422. In these regulations Customs imposes on itself the requirement to demand payment from a party who has not met the conditions of a customs bond. 19 C.F.R. § 172.1(a).[1] If that party does not pay within 60 days of Customs' mailing of notice, "the district

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1 It appears that Customs may not have adhered strictly to its regulations. Section 172.1(a) of Title 19 of the Code of Federal Regulations (1982) requires Customs to notify the surety of liability on the bond "at the same time as the principal." According to the original complaint in this action, the United States made a formal demand on Old Republic on November 20, 1987 -- over four years after it made a demand on Commodities. The only other evidence of record before this court on this issue, Customs' own automated billing record, gives November 16, 1987, as a date Customs made a demand on the surety.

director of Customs, after required collection action, shall refer the claim promptly to the United States attorney." 19 C.F.R. § 172.2(a) (1982).

[5] As a general principle, this court recognizes that "[u]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *Chevron U.S.A. v. United States*, 923 F.2d 830, 834 (Fed.Cir.), *cert. denied*, -- U.S. --, 112 S. Ct. 167, 116 L. Ed. 2d 131 (1991); *Nager Elec. Co. v. United States*, 368 F.2d 847, 851-52, 177 Ct.Cl. 234 (1966). The Supreme Court also has long recognized this general rule. *United States v. Lindsay*, 346 U.S. 568, 569, 74 S. Ct. 287, 288, 98 L. Ed. 300 (1954) ("In common parlance a right accrues when it comes into existence..."); *Unexcelled Chem. v. United States*, 345 U.S. 59,65, 73 S. Ct. 580, 583, 97 L.Ed. 821 (1953) ("A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling.").

[6] This court must assess, however, the effect of Customs' regulations on this general rule for accrual of a right of action. In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 509-11, 87 S. Ct. 1177, 1181-82, 18 L. Ed. 2d 256 (1967), the Supreme Court permitted a Government contract's disputes clause to delay accrual of a right of action arising under the contract. The contract bound the contractor to exhaust

administrative remedies before instituting suit. *Id.* At 511-12, 87 S.Ct. At 1182. Where the parties had agreed in advance to a condition on the filing of a suit, the Supreme Court gave effect to that agreement by delaying accrual of the right of action.

In this case, however, the parties have not agreed to conditions on institution of a suit, rather Customs has unilaterally adopted regulations which delay filing of actions. The bond agreement does not require Customs to demand payment or to send notice before suing Commodities or Old Republic. The bond does not require Customs to wait 60 days for a response to the demand before suing. Moreover, Customs' regulations do not state that commencement of the statutory period is postponed until after Customs gives notice and waits 60 days for a response. No statute requires Customs to give notice of demand for liquidated damages before suing. Without agreement of the parties or statutory obligations delaying the institution of suit, the general rule for accrual of a right of action still applies.[2]

The trial court erred in postponing commencement of the

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2. Under the bond agreement, Old Republic agreed to pay liquidated damages "[i]f principal defaults." The bond agreement did not require Customs to demand payment from Old Republic before suing. Thus, under the terms of the bond, Old Republic incurred liability to Customs when Commodities breached the bond. Customs' right of action against Old Republic therefore accrued at the same time its right of action accrued against Commodities.

limitations period until after Customs complied with its own regulations. While Customs' self-imposed internal procedures may constrain its right to sue, a question we do not decide here, they cannot change the defendants' right to repose after the statutory six-year period. Customs' internal procedures are a unilateral effort to settle the dispute without resort to legal action.[3] This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.

By its terms, 28 U.S.C. § 2415 is subject also to statutory exceptions to the general rule regarding accrual of causes of action. The relevant statute, 28 U.S.C. § 2416 (1988), states:

> For the purpose of computing the
> limitations periods established in section

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3. The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521, 87 S.Ct. 1177, 1187, 18 L.Ed.2d 256 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n. 14, 87 S.Ct. at 1187 n. 14 (citations omitted).

The intent of "equality" is not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

2415, there shall be excluded all periods during which -- . . . . (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances . . . .[4]

The language of section 2416(c) requires this court to examine the nature of the "facts material to the right of action." Only facts which could not reasonably be known by a relevant Government official postpone accrual. Under the facts of this case, relevant Government officials reasonably could have known of the cause of action before March 17, 1983. Thus, in the words of our sister circuits, "once the facts making up the 'very essence of the right of action' are reasonably knowable, the § 2416 bar is dropped." *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1250 (9th cir.1988) (quoting *United States v. Kass*, 740 F.2d 1493, 1497 (11th

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4. While acknowledging that this subsection would primarily apply to cases of fraudulent concealment of Government causes of action, Congress recognized that the complexities and size of the Government could impede responsible officials' knowledge of material facts. S.Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507; *see also United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir.1984). The legislative history of section 2416(c) explains:

> It is not intended that the application of this exclusion will require the knowledge a the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose.

S.Rep. No. 1328 at 6.

Cir.1984) (quoting S.Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2508)).

Section 2416(c) does not postpone accrual of the Government's cause of action beyond March 17, 1983. On February 22, 1983, Customs inspected Commodities' warehouse. These inspecting officials found that Commodities had not marked some merchandise with proper warehouse entry numbers. The absence of the markings breached the bond. Simply viewing the boxes made this blatant breach apparent. Thus, because the Government's right of action accrued before March 17, 1983, this action is time barred.

CONCLUSION

The Court of International Trade properly asserted jurisdiction over this action. That court also applied the proper statute of limitations. However, that court erred in finding that the Government had filed its action within the six-year time bar.

REVERSED.

APPENDIX J -- TIMELINE OF EVENTS.

Sept. 28, 1987	June 2, 1988	Feb. 15, 1989	May 15, 1989	June 23, 1989	June 13, 1994	Aug. 13, 1994	Sept. 27, 1994
6 yrs. Statute of Limitations Commences	Statute tolled due to SRP Agreement	SRP Match Deadline By Contract	Retroactive unilateral extension of Match deadline (April 3, 1989) 42 C.F.R. §62.73 (f),(d)	NHSC sends letter to Tyrrel advising that deadline had passed	Statute of Limitations expires if Feb. 15, 1989 Match Deadline	Statute of Limitations expires if May 15, 1989 Match Deadline	Suit filed

APPENDIX K –JUNE 23, 1989 LETTER FROM THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO DR. ROBERT TYRREL

DEPARTMENT OF HEALTH & HUMAN SERVICESPublic Health Service
BUREAU OF HEALTH CARE DELIVERY AND ASSISTANCE

Health Resources and
Services Administration
Rockville MD 20857
[JUN 23 1989]

ROBERT TY TYRREL
C/O HENRY G. WYKOWSKI
240 STOCKTON ST., SUITE 400
SAN FRANCISCO CA 94108

Dear Dr. Tyrrel:

Through submission of an Option 2, Special Repayment Program (SRP) Agreement, you expressed an interest in serving your obligation to the Public Health/National Health Service Corps (PH/NHSC) Scholarship Training Program and/or NHSC Scholarship Program.

Since the deadline for matching to and SRP Option 2 has passed, you no longer have the opportunity of serving under the SRP. Although you have had several opportunities to serve your scholarship obligation (which may have included the regular placement cycle, a Conditional Service Agreement, a

Appendix K

Forbearance Agreement (FA), and the Special Repayment Program), we are offering you, under the terms of an FA, one final opportunity to serve your obligation in lieu of repaying your debt monetarily.

We have reviewed your status and it has been determined that you may serve with the Indian Health Service (IHS). However, before you can be approved for service, you must complete, have notarized and return the enclosed FA within 2 weeks from the date of this letter. The address is: Division of Health Services Scholarships, Parklawn Building, Room 7-16, 5600 Fishers Lane, Rockville, Maryland 20857. In order to expedite the return of the FA, we have enclosed a self-addressed, franked [sic] envelope.

Your signed and notarized FA means that you agree to fulfill your obligation as a radiologist with the IHS. If we accept the FA, the collection of your monetary debt will be suspended, and upon satisfactory completion of your obligation, your total debt will be discharged.

When we receive the FA, we will notify you regarding its acceptability. If you should have any questions about the FA, please write to the Default Branch at the above address. If we accept the FA, the IHS will contact you shortly about a specific vacancy. Meanwhile, your status as a defaulter remains unchanged. Collection of your debt will not be suspended until your FA is accepted and an approved copy is returned to you.

Appendix K

Sincerely yours,

Joseph B. Hayden
Director
Division of Health Series
Scholarships

Enclosures